IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-128

KRANCO, INC.,
Petitioner

against

NATIONAL LABOR RELATIONS BOARD,
Respondent

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF AUTHORITIES

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The National Labor Relations Board has apparently chosen not to oppose the Petition for a Writ of Certiorari previously filed by Kranco, Inc. in this cause. This is no doubt due to their inability to refute the assertion that the decision rendered by the Fifth Circuit Court of Appeals in the instant case is in direct conflict with those of other courts of appeal and of the Supreme Court. The divergent views regarding the burdens of proof and the criteria for their fulfillment in proceedings under § 8(a)(3) of the LMRA were in fact artfully delineated

by NLRB General Counsel Irving in his address before New York University's National Conference on Labor, delivered June 15, 1978, entitled "How the Board Fares in Court." He explicitly stated:

> ". . . there are several significant areas where one or more circuits strongly disagree with a legal theory the Board has adopted. For example, the First and Ninth Circuits do not accept the Board's test that a discharge motivated in any way by both lawful and unlawful considerations violates the Act. These circuits require that the unlawful motive be dominant, or, stated another way, the employee would not have been discharged "but for" his protected concerted activities. They base their position on a recent Supreme Court decision, *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977), which although not dispositive of the issue, lends weight to the dominant motive test. The Board is now considering its position in this area in light of *Doyle,* before attempting to obtain Supreme Court review." BNA, Daily Labor Report (June 19, 1978).

Hence, any contention by the Board that the law in this area was decisively settled would constitute no more than a pretense since the NLRB itself admits to reconsidering its stance on the matter, and concedes that Supreme Court review will ultimately be necessary.

The time for such review is ripe in the instant case, as demonstrated by the issuance of a recent Fifth Circuit Court of Appeals decision which further compounds the pre-existing decisional disarray in the area of mixed motive discharges under § 8(a)(3) and which confirms that there is an urgent need for a decisive statement by the Supreme Court. In *NLRB v. Big Three Ind. Gas & Equipment Co.,* 579 F.2d 304, 315-316 (5th Cir. 1978), the court announced a garbled standard declaring that in determining the validity of a discharge decision activated by two goals, one legitimate and the other condemnatory, "in this circuit, the threshold for illegality is crossed if the force of the invidious purpose is 'reasonably equal' to the lawful motive prompting conduct." Hence, the court adds a new standard, the "reasonably equal" test, to the ever multiplying melange of standards by which to gauge the propriety of an employee's discharge. However, in a footnote, the court admits that this newly conceived test is contrary to that applied by other circuits, and almost diametrically opposed to that of the First Circuit.

Moreover, the perplexity of its guideline is compounded by the use of the word "threshold," both in the text of the opinion and in the footnote where the court states "in fact, the threshold for illegal motive may not require a reasonable equality, but may, according to some cases, be met if invidious purpose is part of the decision at issue." If the term "threshold" were construed as pertaining to the Board's prima facie case, the statement would probably be in accord with other decisions. In *Big Three* and in the instant case, however, where the employer proffered a valid business justification, the "threshold" had already been crossed, but the door should still have been shut on the Board when it failed to meet its burden of convincingly rebutting the legitimate motive offered by the employer.

In addition, the opinion contains the comment that "the employer has failed to establish that business justification was dominant." This statement specifically contravenes virtually all precedent in this area wherein both

the Fifth Circuit and the other circuits have reiterated on numerous occasions that the employer has the burden only to offer a valid reason for his actions, and then the burden shifts back to the Board to show that the employer was, in reality, motivated predominantly by anti-union animus, rather than by business necessity. *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576 (5th Cir. 1967).

In the *Big Three* decision favorable reference is further made to Judge Thornberry's concurrence in *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1263-1265 (5th Cir. 1978) wherein it is said that he "ably refuted" the contention that the "but for" test applied in the Fifth Circuit to the Board's rebuttal burden. The heart of his analysis was as follows:

> "However, this Court has repeatedly held that the existence of a good cause to fire an employee cannot validate a dismissal that was in fact motivated by union animus. *E.g., N.L.R.B. v. Big Three Indus., Inc.*, 497 F.2d 43, 49 (5th Cir 1974); *N.L.R.B. v. Central Power & Light Co., supra* at 1322. This standard is obviously contrary to a 'but for' test under which an employer filled to the brim with union animus can nonetheless fire an employee who is a union activist if that employee would have been fired anyway.
>
> The Supreme Court has utilized a 'but for' test in first amendment cases, *e.g., Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), but that hardly means the test is appropriate in the labor context. In *Mt. Healthy* the Court, as it has done so often, struck a balance between competing interests. Similar competing interests exist in the labor setting, but there Congress has already established a balance by passing the labor laws. That balance favors the employee, for Congress clearly recognized the superior bargaining position of the employer. *See American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 316, 85 S.Ct. 955, 966, 13 L.Ed.2d 855 (1965) (labor laws attempt to redress the 'imbalance of economic power between labor and management'). The 'but for' standard significantly restrikes this balance in favor of the employer, and such a test is contrary to Congressional policy and the case law in this Circuit." *Federal-Mogul Corp. v. N.L.R.B., supra* at 1265.

Petitioner respectfully submits that such controversial analysis only heightens rather than diminishes the necessity that this Court address this issue.

In summary, it is imperative to recognize the interrelationship between the shifting of the burden back to the Board to rebut the employer's business justification and the test to be applied to determine whether the Board has fulfilled its overall burden of proof, for as the stringency of the test decreases, the rebuttal burden cast upon the Board diminishes proportionately. Ultimately, if the criteria by which the Board can refute the employer's legitimate motive becomes quite lax, the shifting of the burden back to the Board becomes an illusion since the Board can always argue that its "prima facie" showing established that the discharge was "in part" unlawfully motivated. Such appears to have occurred in the instant case, when the Fifth Circuit found the Board to have carried its burden by merely labeling the employer's asserted business justification "pretextual" without adducing further evidence, thereby denigrating to a meaningless fiction the long recognized rebuttal burden placed on the Board.

Therefore, it is essential that the Supreme Court analyze the conflicting authorities on the subject, and chart a definitive course governing the analysis of discriminatory discharge cases under the LMRA. To be fully effective, such procedure must encompass both the allocation of the respective burdens between the Board and the employer and succinctly state the test to be utilized to evaluate whether the Board has met its overall burden.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Petition for Writ of Certiorari have been served upon Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570, and Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to them postage prepaid, at their respective addresses this _____ day of October, 1978.

CLINTON S. MORSE